

STATE OF WEST VIRGINIA

Offices of the Insurance Commissioner

JOE MANCHIN III
Governor

October 2010

JANE L. CLINE Insurance Commissioner

WEST VIRGINIA INFORMATIONAL LETTER

NO. 176

TO: All Insurance Companies Licensed to Write Workers' Compensation Insurance in the State of West Virginia, Third-Party Administrators that Administer Workers' Compensation Plans, and Employers that Self-insure their Workers' Compensation Risks

RE: Workers' Compensation Dependents' Death Benefits - Notices to Dependents Under W. Va. Code §23-4-10(f)

This Informational Letter explains how the Offices of the Insurance Commissioner (OIC) will implement a recent statutory change that requires OIC to prescribe a form notice regarding dependents' benefits in certain circumstances in which it is believed that an occupational injury or disease contributed to an injured worker's death. This letter includes form notices to be used by self-insured employers, private carriers and TPAs to inform potential beneficiaries of their rights under the statute and to explain how to apply for such benefits.

W. Va. Code §23-4-10(f) was added in 2010¹ and provides as follows:

The Insurance Commissioner shall prescribe a form notice to be sent by the commissioner, private carrier or self-insured employer, as applicable, to the dependent with the first payment and six months prior to the last payment of the benefits provided in subsection (e) of this section, that advises the dependent that the benefits will stop as of a date certain. The notice shall also advise the dependent that he or she may be eligible for additional benefits under section fifteen of this article and how to apply for those benefits. The notices shall be written in plain English in a manner that is easily understood by the general public.

The required form notice must be sent to dependents of any worker who died while receiving permanent total disability (PTD) benefits. Under W. Va. Code §23-4-10(e), those dependents are entitled to an award of benefits in an amount equal to that which the deceased worker would have received in PTD benefits for 104 weeks at the rate he or she was receiving at the time of his or her death; this sum may, at the dependent(s) option, be received over the full 104 weeks or in a lump sum. The new notice requirement, however, raises several questions.

¹ In addition to this new notice requirement, Enr. Com. Sub. for H.B. 4459 (effective June 8, 2010) amended §23-4-15(b) to extend -- from one year to two years after the worker's death -- the period in which a dependent could apply for death benefits where it was alleged that occupational pneumoconiosis contributed in any material degree to a deceased workers' death.



Who is entitled to receive the §23-4-10(e) notices? The statute provides that the initial notice be sent "to the dependent with the first payment ...of the [104-week award] ...", so the notice tracks the initial payment (which may be a lump sum) of that award. However, entitlement to the benefits is often shared *jointly* among all members of the class of dependents within the applicable statutory order of preference, so who exactly within that class is entitled to the notices is less than clear. However, inasmuch as any application for a 104-week award will include "proofs of dependency" from those seeking such an award, the entity liable for payment of the 104-week award will also have a record of who is entitled to the notice. The §23-4-10(f) notice must be sent to each adult dependent who is entitled to a share of the 104-week award. In the event that the responsible entity has a single address for more than one dependent, a single mailing to that address will suffice if all dependents are listed in the enclosed notice.

A second notice must also be sent to the dependent(s) "six months prior to the last payment" of the 104-week benefits. If the 104-week benefit is taken as a lump sum, the initial notice will serve as the second notice as well and no second mailing must be made. Otherwise, in all cases in which the 104-week benefit was not taken as a lump sum, a second notice, sent 6 months prior to the last payment of the 104-week award, will suffice if sent to the same person(s) to whom the initial notice was sent. This notice, attached as appendix C, includes a reference to only OP as a contributory cause of death because by the time this notice would be sent -- 6 months prior to the last payment of the 104-week award -- the time periods to file an application for Dependents' Death Benefits alleging as a contributory cause of death an injury (six months) or OD (one year) would have already expired.

How must the notices be transmitted? The statute provides that the initial notice be "sent ... to the dependent with the first payment" W. Va. Code §23-4-10(e). This language seemingly ignores the fact that most payments are not "sent to" dependent(s) in the usual sense but are instead automatically deposited in their bank accounts. Therefore, in recognition of this relatively recent change in payment procedures, OIC will require that the §23-4-10(f) notices must be sent to the dependent(s) by first class mail on or prior to the date on which the initial payment is either mailed to the dependent(s) or when the initial deposit is made; if a second notice is necessary (in non-lump-sum situations), it must be sent by first class mail to the same person(s) six months prior to the last payment/deposit.

What form of notice meets the statutory requirements? OIC has developed various form letters that will suffice under the new statute; these are attached as appendices A, B and C and may also be found on OIC's website. The purpose of these letters is essentially twofold: First, to apprise the dependents that they may be eligible for additional benefits should they be able to demonstrate that a compensable injury or disease contributed in any material degree to the decedent's death, and second, to warn the dependents about the strict statutory time limits for filing for such benefits.

² Although not expressly made applicable to the payment of the 104-week benefits, OIC assumes that the Legislature intended that such payments follow the same order of preference among dependents as that set forth for Dependents' Death Benefits in W. Va. Code §23-4-10(b) & (c).

³ See W. Va. Code §23-4-15(a).

What is the effect of the change in the filing period for OP-related deaths? -- The effective date of the statutory change was June 8, 2010, and there is some question about the effect, if any, of the change in the time to file an application for OP-related Dependents' Death Benefits -- from one to two years from death -- with respect to dependents of workers who died prior to the effective date of the new law. OIC has determined that basic rules of statutory construction dictate the following rule with respect to applications for Dependents' Death Benefits related to the death of a person who was receiving PTD benefits at his or her death in which OP is claimed to have contributed in any material degree to the death: If the death was prior to June 8, 2009, the application will be deemed untimely because the one-year limit would have expired before the new two-year limit went into effect, and if the death occurred on or after June 8, 2009, the application will be deemed to be timely if filed within two years of death. This rule recognizes that the change in the filing period does not revive claims that were time-barred as of June 8, 2010, but it confers the full benefit of the increase in the filing period on claims that could be timely filed when the law went into effect.⁴

If you have a question concerning this Informational Letter, please e-mail your question to Informational.Letters@wvinsurance.gov or call (304) 558-0401.

Jane L. Cline

Insurance Commissioner

⁴ See Lester v. State Workmen's Compensation Comm'r, 161 W. Va. 299, 304, 242 S.E.2d 443, 446 (1978) (adopting majority rule that "statutes enlarging the limitation period are merely procedural and remedial in nature and are applicable to claims not barred under the original limitation period at the effective date of the statute enlarging the limitation period").

INITIAL NOTICE UNDER W. VA. CODE §23-4-10(f) TO RECIPIENTS OF 104-WEEK AWARD PAID IN MONTHLY PAYMENTS

[DATE]

[DEPENDENTS' NAME(S)] [DEPENDENTS' ADDRESS]

Re: [CLAIM NO.]

[CLAIM INFORMATION]

Dear [NAME OF DEPENDENT(S)]:

By decision dated _____, you were granted a 104 Weeks Dependents' Benefits award. The award covers the period from ______ to ____. The first payment of benefits will be issued to you within fifteen (15) days after the order granting such benefits. The last payment of benefits will be issued on _____.

Please be advised that you may be entitled to additional benefits under West Virginia Code § 23-4-10(b), if an occupational injury or occupational disease contributed in any material degree to the death of [NAME OF DECEASED EMPLOYEE].

In order to apply for the award of Dependents' Death Benefits provided under West Virginia Code § 23-4-10(b), you must file an application with the employer that you believe is responsible for the occupational injury or occupational disease that contributed in any material degree to the decedent's death or to that employer's carrier. This form and instructions for filing it can be found on the WV Offices of the Insurance Commissioner's website (www.wvinsurance.gov). You may also call the OIC at 888-879-9842 for assistance.

If you are alleging that an occupational injury contributed to the death of [DECEASED EMPLOYEE'S NAME], the application and proofs of dependency must be filed within six (6) months from and after the employee's date of death.

If you are alleging occupational pneumoconiosis contributed to the death of [DECEASED EMPLOYEE'S NAME], the application and proofs of dependency must be filed within two (2) years from and after the employee's date of death.

Finally, if you are alleging that an occupational disease other than occupational pneumoconiosis contributed to the death of [DECEASED EMPLOYEE'S NAME], the application and proofs of dependency must be filed within one (1) year from and after the employee's date of death.

PLEASE NOTE THAT THESE TIMES FOR FILING ARE A CONDITION THAT MUST BE MET OR THE RIGHT TO COMPENSATION WILL BE FOREVER BARRED.

If you have any questions or concerns, you may contact me at [PHONE NUMBER OF CLAIMS ADJUSTER].

Sincerely,

CLAIMS ADJUSTER

NOTICE UNDER W. VA. CODE §23-4-10(f) TO RECIPIENTS OF 104-WEEK AWARD PAID IN A LUMP SUM

DATE

[DEPENDENTS' NAME(S)]
[DEPENDENTS' ADDRESS]

Re: [CLAIMNO.]

[CLAIM INFORMATION]

Dear [NAME OF DEPENDENT(S)]:

By decision dated _____, you were granted a 104 Weeks Dependents' Benefits award. The award covers the period from ______ to ____. As you elected to receive payment of the award in a lump sum, the first, and only payment of benefits of this award will be issued to you within fifteen (15) days after the order granting such benefits.

Please be advised that you may be entitled to additional benefits under West Virginia Code § 23-4-10(b), if an occupational injury or occupational disease contributed in any material degree to the death of NAME OF DECEASED EMPLOYEE].

In order to apply for the award of Dependents' Death Benefits provided under West Virginia Code § 23-4-10(b), you must file an application with the employer that you believe is responsible for the occupational injury or occupational disease that contributed in any material degree to the decedent's death or to that employer's carrier. This form and instructions for filing it can be found on the WV Offices of the Insurance Commissioner's website (www.wvinsurance.gov). You may also call the OIC at 888-879-9842 for assistance.

If you are alleging that an occupational injury contributed to the death of [DECEASED EMPLOYEE'S NAME], the application and proofs of dependency must be filed within six (6) months from and after the employee's date of death.

If you are alleging occupational pneumoconiosis contributed to the death of [DECEASED EMPLOYEE'S NAME], the application and proofs of dependency must be filed within two (2) years from and after the employee's date of death.

Finally, if you are alleging that an occupational disease other than occupational pneumoconiosis contributed to the death of [DECEASED EMPLOYEE'S NAME], the application and proofs of dependency must be filed within one (1) year from and after the employee's date of death.

PLEASE NOTE THAT THESE TIMES FOR FILING ARE A CONDITION THAT MUST BE MET OR THE RIGHT TO COMPENSATION WILL BE FOREVER BARRED.

If you have any questions or concerns, you may contact me at [PHONE NUMBER OF CLAIMS ADJUSTER].

Sincerely,

[CLAIMS ADJUSTER]

SECOND NOTICE UNDER W. VA. CODE §23-4-10(f) TO RECIPIENTS OF 104-WEEK AWARD PAID IN MONTHLY PAYMENTS

[DATE]

[DEPENDENTS' NAME(S)]
DEPENDENTS' ADDRESS

Re: [CLAIM NO.]
[CLAIM INFORMATION]

Dear NAME OF DEPENDENT(S):

By decision dated _____, you were granted a 104 Weeks Dependents' Benefits award. The award covers the period from ______ to _____. The first payment of benefits of this award was issued to you on _____. The last payment of benefits of this award will be issued on _____.

Please be advised that you may be entitled to additional benefits under West Virginia Code § 23-4-10(b), if occupational pneumoconiosis contributed in any material degree to the death of NAME OF DECEASED EMPLOYEE.

In order to apply for the award of Dependents' Death Benefits provided under West Virginia Code § 23-4-10(b), you must file an application with the employer that you believe is responsible for the occupational pneumoconiosis that contributed in any material degree to the decedent's death or to that employer's carrier. This form and instructions for filing it can be found on the WV Offices of the Insurance Commissioner's website (www.wvinsurance.gov). You may also call the OIC at 888-879-9842 for assistance.

If you are alleging occupational pneumoconiosis contributed to the death of [DECEASED EMPLOYEE'S NAME], the application and proofs of dependency must be filed within two (2) years from and after the employee's date of death.

PLEASE NOTE THAT THE TIME FOR FILING IS A CONDITION THAT MUST BE MET OR THE RIGHT TO COMPENSATION WILL BE FOREVER BARRED.

If you have any questions or concerns, you may contact me at [PHONE NUMBER OF CLAIMS ADJUSTER].

Sincerely,

[CLAIMS ADJUSTER]